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No. 06-907

IN THE
Supreme Court of the United States

COUNTY BANK OF REHOBOTH BEACH, DELAWARE AND MAIN STREET SERVICE CORPORATION,

Petitioners,

v.

JALIYAH MUHAMMAD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners County Bank of Rehoboth Beach, Delaware and Main Street Service Corporation respectfully submit this Reply in Support of Petition for Writ of Certiorari to satisfy the Court that it has jurisdiction to hear Petitioners' claim under 12 U.S.C. section 1257(a), and that it also may hear Petitioners' second and third bases for granting the Writ of Certiorari.

Respondent argues that the Court lacks jurisdiction over the New Jersey Supreme Court's judgment, which struck key terms of the parties' arbitration agreement and remanded the case for arbitration consistent with its ruling, but inconsistent with the contract's express, agreed upon terms. Respondent further argues that the Petitioners' second and third bases for granting their Writ—that the New Jersey ruling violates the Petitioners' due process rights and unduly burdens interstate commerce—were not timely raised below and may not be considered.

None of Respondent's arguments calls into question this Court's jurisdiction to grant the Writ. On both points, the Court's exercise of jurisdiction is sound and warranted.

I. THE COURT HAS JURISDICTION TO GRANT THE PETITION BECAUSE THE NEW JERSEY SUPREME COURT RULING IS FINAL WITHIN THE MEANING OF 28 U.S.C. § 1257.

This Court always has given a "practical rather than technical" construction to section 1257, *Cohen v. Beneficial Industry Loan Corp.*, 337 U.S. 541, 546 (1949), using a "pragmatic approach" to determine whether a state court's ruling meets Section 1257's finality requirement. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). The Court often has found that this practical test requires the Court to exercise jurisdiction in that class of cases where the state court ruling "finally determines claims of right separable from, and collateral to, rights asserted in the

action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen, supra*, 337 U.S. at 546.

The Court has "recurringly encountered" cases where the state high court has determined a federal issue, but where further proceedings in lower state courts are expected. *Cox, supra*, 420 U.S. at 477. Accordingly, the Court set forth four different scenarios under which the Court would review a state court decision if some part of the action remained to be decided. *Id.* This case presents two of those scenarios.

A. Refusal of immediate review will seriously erode federal arbitration policy.

Without this Court's immediate review of the New Jersey Supreme Court decision, there will be no opportunity to pass on the federal preemption issue. Leaving the New Jersey decision in place and unreviewed has widespread consequences for federal arbitration policy—the core purpose of arbitration will be undermined if review is delayed until after this litigation has run its course. In cases such as this one, the Court's exercise of jurisdiction is necessary and proper.

The Court relied on this *Cox* exception in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), when the California Supreme Court ruled that the state's franchise statute nullified the parties' arbitration agreement, allegedly without violating the FAA. Citing the national policy favoring arbitration, the Court found jurisdiction because "without immediate review. . .. there may be no opportunity to pass on the federal issue and as a result there would remain in effect the unreviewed decision" hostile to the purpose of the FAA. *Id.* at 6.

This Petition presents the same critical question and is subject to this Court's jurisdiction on the same grounds. Petitioners request that the Court review whether the Federal Arbitration Act preempts a state court's attempt to alter an arbitration agreement, if the terms of the agreement to arbitrate expressly preclude class procedure. This very question troubled the Court in *Southland*, but eluded review because it was not properly raised below. *Id.* at 8. The Court has understood the importance of the question raised in this Petition for over 20 years, and its resolution has a substantial impact on the state's power to dictate how arbitrations governed by the FAA will be conducted.

State court rulings challenging the FAA are well suited to review by this Court in order to protect the federal policy favoring arbitration. In *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 473 (1989), this Court granted review from a decision refusing to enforce an arbitration agreement under the FAA. More recently, this Court granted review of another FAA case where the Florida Supreme Court issued a ruling hostile to the FAA, and then remanded for further proceedings at the lower state court. *See Cardegna v. Buckeye Check Cashing, Inc.*, 894 So.2d 860 (Fla. 2005)("[W]e quash and remand *Buckeye* for further proceedings consistent with this opinion."), *reversed and remanded, sub nom, Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006).

Preemption questions merit the same consideration, and are regularly granted review, as are cases where a national policy interest is presented. *See Mid-Con Freight Sys. v. Mich. PSC*, 545 U.S. 440 (2005) (review of a state court decision rejecting the federal preemption defense granted); *see Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988)(finding jurisdiction where review of preemption ruling of Ohio Supreme Court had "important implications" in other states); *see Mississippi Power & Light Co. v.*

Mississippi, 487 U.S. 354, 370 n.11 (1988)(finding jurisdiction of final judgment where "[t]he critical federal question—whether federal law preempts [state proceeding]—has already been answered by the State Supreme Court.), *see also Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963) (Section 1257 does not prohibit the Court from holding as final a state supreme court judgment affirming a lower court's grant of temporary injunction, even where case was still awaiting trial on the merits, "particularly when postponing review would seriously erode national labor policy.").

The Petition before the Court presents an FAA preemption question that necessarily affects, and can substantially alter, the national policy favoring arbitration. As a result, this Court should exercise jurisdiction and would be on firm ground in doing so.

B. Absent immediate review, further proceedings may render the New Jersey decision unreviewable.

The Court should hear this case because the federal preemption, Due Process and Commerce Clause questions presented here will be lost or otherwise not reviewable after further state proceedings.

Petitioners effectively will lose the ability to challenge the New Jersey Supreme Court decision if a class arbitration is completed. No court, state or federal, then will be able to grant the Petitioners more than a Pyrrhic victory. Further, a state appellate court reviewing the arbitrator's decision for abuse of discretion will be bound by the New Jersey Supreme Court ruling, and will not be able to remedy the Due Process and Commerce Clause violations.

In determining finality, "the most important competing considerations are 'the inconvenience and costs of piecemeal

review on the one hand and the danger of denying justice by delay on the other.'" *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). The costs of delay in this matter are considerable. *Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363, 364 n.1 (1973); *id.* at 389-393 & n.10 (Burger, C.J., dissenting) (noting extraordinary expense and inefficiency from failure to resolve threshold issue of federal law, with Court dismissing certiorari and remanding for trial, and then holding that entire litigation was for naught).

Respondent proposes an approach with high cost and potentially irreversible effects on the Petitioners. Class arbitration will severely hinder the low-cost and efficient resolution of Respondent's dispute—the hallmark of arbitration. Class arbitration, if authorized, will require class certification proceedings and class notice. Discovery and pre-merits matters will cost all parties substantial time and money, most of which cannot be saved even if the Petitioners settle to avoid the expense.

Forcing Petitioners to address the time-consuming and expensive class action procedures first, despite a previously negotiated waiver, would render the issue effectively unreviewable. While class arbitration would increase the stakes exponentially over an individual arbitration, any classwide arbitral award would remain reviewable only for fraud, corruption or bias, *see* 9 U.S.C. § 10, or "manifest disregard" of the law, *see Wilko v. Swan*, 346 U.S. 427, 436-437 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

The federal issues may be lost by the time this case reaches this Court again, ***if*** the Petitioners can bear the expense of keeping it alive for that long. *See Kansas v. Marsh*, 126 S.Ct. 2516, 2521 (2006) (finding jurisdiction where Petitioner's issue would be eventually reviewable only

on narrow grounds for appeal that would be inapplicable to Petitioner's case).

The Court must weigh the short delay caused by its review (and anticipated by the Federal Arbitration Act, hereinafter, the "FAA") against the burden and expense of unnecessary potential class arbitration. The former is a recognized cost of favoring arbitration;[1] the latter is a serious burden that should be avoided, particularly if the decision later will be effectively unreviewable.

II. THE COURT HAS JURISDICTION TO REVIEW PETITIONERS' DUE PROCESS AND COMMERCE CLAUSE CLAIMS BECAUSE PETITIONERS PROPERLY RAISED THESE ISSUES BELOW.

Petitioners appropriately preserved their Due Process and Commerce Clause arguments for review before this Court. In *Muhammad*, the New Jersey Supreme Court articulated a new legal principle and applied it retroactively to the Petitioners, thus violating Petitioners' procedural due process rights. *See* App. A at 17-18. (New Jersey Supreme Court expressly noting that the issue of class arbitration "specifically has never before been examined by this Court.").

Respondent's claim that Petitioners waited until the "eleventh hour" ignores the procedural history of this case. The New Jersey trial and appellate court opinions upholding the parties' arbitration agreements had done so under *Gras v.*

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[1] It is worth noting that the FAA, on which Petitioners base their Petition, recognizes that piecemeal litigation may be *required* to effect Congress' stated intent to favor arbitration. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement").

Associates First Capital Co., 346 N.J. Super. 42, 49-57 (App. Div. 2001), *cert. denied*, 171 N.J. 445 (2002), which had held that a waiver of certain rights in an arbitration clause would be enforced so long as they were sufficiently notorious and specific. Until the New Jersey Supreme Court changed this rule of law, and retroactively applied that ruling to Petitioners, there was no basis for raising the Due Process claim. Once the issue was ripe, Petitioners preserved it for review by raising it in their motion for reconsideration. The motion for reconsideration is reprinted at App. F.

Similarly, until the New Jersey Supreme Court articulated a new "small dollar" rule, its prior jurisprudence on the enforceability of arbitration agreement did not unduly burden interstate commerce by applying a more restrictive state law rule not to all contracts, or even to all arbitration agreements, but only to the narrow class of agreements relating to the procedures available in arbitration, and only to certain entities whose business may generate small dollar consumer claims.

Petitioners raised these issues on motion for reconsideration – the first opportunity to do so – and therefore properly preserved them for review by the Court.

III. CONCLUSION

The Court has multiple bases on which to grant review of the FAA preemption, Due Process, and Commerce Clause concerns presented by this Petition. It therefore should grant review to protect the national policy favoring arbitration, finally resolve the question raised by *Southland*, and protect the due process rights of the Petitioners.

Respectfully submitted,

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